No. 83-349

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GREGORY T. LANG,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the State of Georgia

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

1.

Whether this Court should grant a writ of certiorari to examine the denial of Petitioner's motion to suppress based on an alleged illegal search warrant, when an examination of the decision of the state court below makes it readily apparent that the denial of the same was squarely, clearly and adequately based on nonfederal grounds, i.e., the decision as based on state law.

2.

Whether the court below erred in concluding that the destruction of evidence without notice to Petitioner was harmless beyond a reasonable doubt.

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PART ONE

Prior Proceedings

The Petitioner, Gregory T. Lang, was indicted by the grand jury of

Gordon County for the offenses of trafficking in marijuana and possession of drug related objects. He waived trial by jury and was tried and convicted by the trial court on March 12, 1982. Petitioner was sentenced to ten years imprisonment and a $25,000.00 fine on the trafficking offense and to a twelve month probated sentence on the possession of drug related objects offense, on the condition that Petitioner pay the $25,000.00 fine.

Petitioner's convictions and sentences were affirmed at Lang v. State, 165 Ga. App. 576, 302 S.E.2d 683 (1983). Rehearing was denied on March 2, 1983. The Supreme Court of Georgia denied certiorari on June 15, 1983.

It is from the decision of the Georgia Court of Appeals that Petitioner seeks the issuance of the requested writ of certiorari.

Further facts may be developed herein as necessary for a more thorough illumination of the issues presented to this Court for resolution.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. BECAUSE THE DENIAL OF PETITIONER'S MOTION TO SUPPRESS WAS SQUARELY BASED ON NONFEDERAL GROUNDS, I.E., THE STATE COURT'S DECISION WAS BASED SOLEY ON STATE LAW, THIS COURT SHOULD NOT GRANT THE REQUESTED WRIT.

On this application for a writ of certiorari, Petitioner contends that the writ should issue as the search warrant upon which evidence was obtained and admitted at trial against Petitioner violated, in some manner unspecified on this instant

application, his rights under the Fourth and Sixth Amendment. Specifically, Petitioner has contended that the search warrant was not issued by a neutral and detached judicial magistrate and that information obtained during an allegedly illegal search was relied upon to obtain a search warrant. These issues were decided adversely to Petitioner by the Georgia Court of Appeals in Lang v. State, supra. That court found that Petitioner had made no showing that the Magistrate who issued the search warrant was not neutral and detached. That court also concluded that no unreasonable search occurred as to render the search warrant invalid.

An examination of the foregoing decision readily reveals that the

denial to Petitioner of relief on these two issues has been firmly and clearly grounded upon Georgia law concerning search warrants. The state court did not address or decide Petitioner's claims on anything other than state law.

With the foregoing in mind, Respondent notes that this Court has consistently adhered to the self-imposed principle that it will not review a state court judgment based upon an adequate and independent nonfederal or state ground, even though a federal question may be involved and perhaps wrongly decided. Berea College v. Kentucky, 211 U.S. 45, 53 (1908). Fox Film Corporation v. Muller, 296 U.S. 207 (1935).

The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state courts

> after we corrected its views of Federal Laws, our review would amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 566 (1977).

It is the Respondent's contention that there exists no federal question for review by this Court as to these two issues. An examination of the foregoing authorities, and the decision rendered by the state court, readily reveals that the decision on the issues concerning the magistrate and the search of the premises sought to be reviewed on this instant application for a writ of certiorari

is clearly and adequately grounded upon state law, as opppsed to federal law. Accordingly, there exists no federal question for review as to these issues.

B. THE COURT BELOW PROPERLY DETERMINED THAT THE DESTRUCTION OF EVIDENCE IN THIS CASE WITHOUT NOTICE TO PETITIONER WAS HARMLESS BEYOND A REASONABLE DOUBT.

Petitioner's heading as to his third issue--that the decision below fails to determine what procedure should be followed by law enforcement officers to protect a defendant's rights before destroying evidence in a case -- is a new issue which Petitioner improperly seeks to raise for the first time on this petition for a writ of certiorari. Cardinale v. Louisiana, 394 U.S. 437, 438 (1969).

In his third issue presented for review, Petitioner claims that the court below improperly determined that the destruction of all but 100 grams of the seized marijuana without notice to Petitioner was harmless error. Respondent submits that the decision of the court below was proper in light of the overwhelming evidence.

The Georgia Court of Appeals found the following facts:

> The State Crime Laboratory forensic chemist and investigating officers testified the bags of processed marijuana, including trash and debris, weighed 144 pounds. It may be inferred beyond a

> reasonable doubt that the remainder of the total 870 pounds of marijuana, i.e., the plants including stalk (cut off above the roots), therefore weighed 726 pounds. The state's expert testified that in his opinion and estimate, approximately two-thirds of a marijuana plant is stalk, the inference thus being reasonable that the remaining one-third is chargeable marijuana under Code Ann. § 79A-802 (O.C.G.A. § 16-13-21(16)); this amounts to 242 pounds of marijuana.

Lang v. State, supra at 579. (See Brief of Petitioner, Appendix B).

The state court acknowledged that it would have been wiser had the prosecution notified Petitioner and his attorney of the destruction of the contraband. The court recognized that the practice of destroying evidence without prior notice to the accused had been denounced in United States v. Henry, 497 F.2d 912 (9th Cir. 1973). However, the court found no "fatal prejudice" in the destruction of all the marijuana except 100 grams. The court concluded that the evidence was "so overwhelming" that Petitioner possessed more than 100 pounds of marijuana that the destruction of all but 100 grams without notice to Petitioner or his attorney, even if it was erroneous, was harmless beyond a reasonable doubt. Lang v. State, supra.

On the motion for rehearing, the state appellate court noted that there were fifteen plastic bags and boxes containing processed marijuana, weighing 144 pounds. Lang v. State, supra at 581. (Brief of Petitioner, Appendix C). The court indicated that the 144 pounds of processed marijuana had not been included in its previous determination that the state had proved Petitioner guilty of the offense of trafficking in excess of 100 pounds of marijuana beyond a reasonable doubt. The court further stated, "We do not think any remotely reasonable doubt exists in this case that there was proved at least 100 pounds of chargeable marijuana . . . " Id.

Relying on United States v. Henry, supra, Petitioner has claimed that the marijuana was destroyed by law enforcement officials in bad faith and that he was prejudiced by this destruction. Respondent acknowledges that that state stipulated at trial there was never an order entered by a judge authorizing the destruction of the marijuana. The decision to destroy the contraband was made by the sheriff and investigating officers after consultation with the district attorney. From these facts alone Petitioner would urge this Court to infer bad faith on the part of said officials. Respondent submits that there is no evidence to warrant such an inference.

There is no reason to believe that state officials were not acting in good faith when they destroyed the marijuana. Certainly, 870 pounds of marijuana would present storage problems as well as security problems. Respondent submits that the officials' actions in destroying all but 100 grams of marijuana were reasonable. The State Crime Laboratory forensic chemist maintained meticulous records as to the marijuana seized, and the records were made available to counsel for Petitioner. Moreover, Petitioner's own expert was permitted to examine and test the retained 100 grams. Respondent asserts that there is no evidence whatsoever to support an inference of

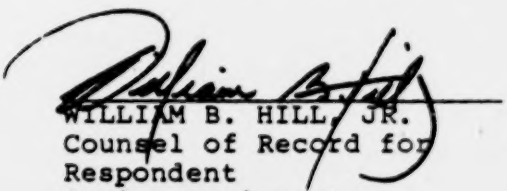
bad faith on the part of law enforcement officials in destroying the marijuana.

Additionally, Petitioner has failed to show that he was prejudiced by the destruction of this evidence. As found by the state appellate court, there was 144 pounds of processed marijuana. There was also 726 pounds of marijuana plants, of which 242 pounds would be chargeable under the trafficking statute. Respondent submits that the court below properly concluded that there was no reasonable doubt that the state had proved Petitioner was in possession of at least 100 pounds of marijuana. Therefore, Respondent respectfully submits that this issue presents nothing for review by this Court.

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Court of Appeals for the State of Georgia, as it is manifest that there exists no federal question for review by this Court as to two issues and, further, no substantial federal question not previously decided by this Court is presented and the decision sought to be reviewed is demonstrably in accord with the applicable decisions of this Court.

Respectfully submitted,



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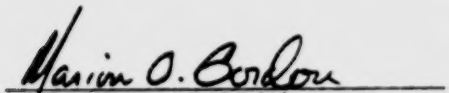

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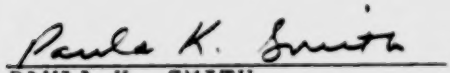

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CERTIFICATE OF SERVICE

I, William B. Hill, Jr., a member of the Bar of the Supreme Court of the United States and counsel of record for the Respondent hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon counsel for the Petitioner by depositing a copy of same in the United States mail with proper address and adequate postage to:

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This 17th day of October, 1983.

/s/
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